would establish a ratio of originating to terminating access minutes of use. Moreover, Ameritech proposes to begin developing a long-term solution for providing such data when the Commission enters a reconsideration order on shared transport. Ameritech states that it will implement a long-term solution only after it has exhausted its judicial remedies.[854] If these issues arise in future applications, as we expect they will, we will look at them very closely.

331. We are likewise concerned by AT&T's allegation that Ameritech has restricted its competitors' ability to access the vertical features of the switch by constructing a burdensome "Switch Feature Request" process.[855] While we do not determine the merits at this time, we would examine carefully any such allegations in any future Ameritech application.[856] In addition, we would consider the interexchange carriers' allegation that Ameritech has refused to provide the customized routing capability of the unbundled switch element, as required by the *Local Competition Order*, should this complaint persist.[857]

4. Combinations of Unbundled Network Elements

332. In the 1996 Act, Congress sought to hasten the development of competition in local telecommunications markets by including provisions to ensure that new entrants would be able to choose among three entry strategies -- construction of new facilities, the use of unbundled elements of an incumbent's network, and resale.[858] Congress included the second entry strategy because it recognized that many new entrants will not have constructed local

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[854] Ameritech Comments,Vol. 2.5, Kocher Aff. at 35-41; Ameritech Reply Comments at 22, and Vol. 5R.12, Kocher Reply Aff. at 73, 76-84.

[855] AT&T Comments at 16, and Vol. IX, Tab J, Falcone and Sherry Aff. at 50-53. *Compare* Ameritech Reply Comments, Vol. 5R.12, Kocher Reply Aff. at 22-26.

[856] *See* Ameritech Reply Comments, Vol. 5R.12, Kocher Reply Aff. at 22-26.

[857] *See* AT&T Comments at 14-15, Vol. IX, Tab J, Falcone and Sherry Aff. at 95-101; AT&T Reply Comments at 5; MCI Comments, Exh. G, Sanborn Aff. at 34-35. *Compare* Ameritech Reply Comments, Vol. 5R.12, Kocher Reply Aff. at 20 (contending that Ameritech provides customized routing "on a standardized basis where facilities permit, which includes the vast majority of switches"). AT&T reports that the Michigan Commission relegated the provisioning of customized routing to the bona fide request process on the grounds that technical feasibility is a legitimate concern in Ameritech's switches. AT&T has challenged that decision in federal court pursuant to section 252(e)(6) of the Act. *See* AT&T Comments at 15 n.9 (citing *AT&T Communications of Michigan, Inc. v. Michigan Bell Telephone Co.*, No. 97-60018 (E.D. Mich)).

[858] *See Iowa Utils. Bd.*, 1997 WL 403401, at *28 ("Congress clearly included measures in the Act, such as the interconnection, unbundled access, and resale provisions, in order to expedite the introduction of pervasive competition into the local telecommunications industry.").

networks when they enter the market.[859] As a result, the ability of new entrants to use unbundled network elements, as well as combinations of unbundled network elements, is integral to achieving Congress' objective of promoting competition in the local telecommunications market.

333. To achieve its objective of ensuring that new entrants would have access to unbundled network elements, as well as combinations of such elements, Congress adopted section 251(c)(3). This provision establishes an incumbent LEC's "duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of [section 251] . . . and section 252."[860] That section further provides that an incumbent LEC "shall provide such unbundled elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service." We concluded in the *Local Competition Order* that section 251(c)(3) does not require a new entrant to construct local exchange facilities before it can use unbundled network elements to provide a telecommunications service.[861] We determined that such limitations on access to combinations of unbundled network elements would seriously inhibit the ability of potential competitors to enter local telecommunications markets through the use of unbundled elements, and would therefore significantly impede the development of local exchange competition.[862] We further determined that incumbent LECs may not separate network elements that the incumbent LEC currently combines.[863] The Eighth Circuit recently upheld these determinations.[864]

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[859] *See id.* ("Congress recognized that the amount of time and capital investment involved in the construction of a complete local stand-beside telecommunications network are substantial barriers to entry, and thus required incumbent LECs to allow competing carriers to use their networks in order to hasten the influence of competitive forces in the local telephone business.").

[860] 47 U.S.C. § 251(c)(3).

[861] *Local Competition Order*, 11 FCC Rcd at 15666.

[862] *Id.*; *see also Iowa Utils. Bd.*, 1997 WL 403401, at *28 (upholding "the remaining unbundling rules as reasonable constructions of the Act, because, as we have shown, the Act itself calls for the rapid introduction of competition into the local phone markets by requiring incumbent LECs to make their networks available to. . . competing carriers").

[863] *Local Competition Order*, 11 FCC Rcd at 15647; *see also* 47 C.F.R. § 51.315(b).

[864] *Iowa Utils. Bd.*, 1997 WL 403401, at *26, *28; *see also Local Competition Third Reconsideration Order* at para. 44.

334. Congress required the Commission to verify that a section 271 applicant is meeting its obligation to provide nondiscriminatory access to unbundled network elements, as well as combinations of networks elements, prior to granting in-region interLATA authorization to the applicant. Section 272(c)(2)(B)(ii) of the Act, item (ii) of the competitive checklist, requires the Commission to ensure that a section 271 applicant is meeting its obligation to provide to provide "[n]ondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1)."[865]

335. Ameritech claims that it meets checklist item (ii), because it is providing "all of the individual network elements that the Commission requires to be unbundled, as well as combinations of elements."[866] Numerous parties vigorously dispute Ameritech's claim that it meets checklist item (ii). These parties argue that Ameritech's refusal to provide unbundled local transport and unbundled local switching in accordance with the Act and the Commission's regulations seriously impairs the ability of new entrants to enter the local telecommunications markets in Michigan through the use of combinations of unbundled network elements.[867] These parties further contend that Ameritech has not deployed adequate OSS functions for the ordering, provisioning, and billing of combinations of unbundled network elements.[868]

336. As discussed elsewhere in this Order, we determine that Ameritech has failed to provide access to OSS functions in accordance with the Act and the Commission's regulations.[869] In addition, although we do not reject Ameritech's application based on Ameritech's provision of access to unbundled local switching and unbundled local transport, we discuss above our concerns about Ameritech's provision of these unbundled network elements.[870] We anticipate that many of these disputes concerning the ability of competing carriers to enter the local telecommunications markets through the use of combinations of unbundled network elements will be resolved as Ameritech conforms its provision of these elements to the Act's and the Commission's requirements. We emphasize that, under our rules, when a competing carrier seeks to purchase a combination of network elements, an

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[865] 47 U.S.C. § 271(c)(2)(B)(ii).

[866] Ameritech Application at 39-40.

[867] AT&T Comments at 17-20; CompTel Comments at 4; LCI Comments at 4-10; MCI Comments at 26; MCI Reply Comments at 5; MFS WorldCom Comments at 21; MFS WorldCom Reply Comments at 11.

[868] *See, e.g.*, AT&T Comments at 22-23; MCI Comments, Exh. D, King Aff. at 56.

[869] *See supra* Section VI.C.5.b.

[870] *See supra* Sections VI.F.2 (unbundled local transport), VI.F.3 (unbundled local switching).

incumbent LEC may not separate network elements that the incumbent LEC currently combines.[871]

337. We note also that Ameritech is currently involved in a series of carrier-to-carrier tests of its OSS functions for the ordering, provisioning, and billing of combinations of unbundled network elements.[872] We expect that, in future applications, Ameritech will present the results of these tests and demonstrate that new entrants are able to combine network elements to provide telecommunications services, as required by the Act and the Commission's regulations. Because the use of unbundled network elements, as well as the use of combinations of unbundled network elements, is an important entry strategy into the local telecommunications market, we will examine carefully these issues in any future section 271 applications.

5. Number Portability

338. Section 271(c)(2)(B)(xi), item (xi) of the competitive checklist, states that "[u]ntil the date by which the Commission issues regulations pursuant to section 251 to require number portability," a section 271 applicant must provide "interim telecommunications number portability through remote call forwarding, direct inward dialing trunks, or other comparable arrangements, with as little impairment of functioning, quality, reliability, and convenience as possible."[873] Section 271(c)(2)(B)(xi) further provides that, after the Commission issues such regulations, a section 271 applicant must be in "full compliance with such regulations."[874] The Commission adopted regulations implementing the number portability requirements in section 251 on June 27, 1996.[875] The rules for interim number portability adopted in the *Number Portability Order* provide, in relevant part:

> All LECs shall provide transitional measures, which may consist of Remote Call Forwarding (RCF), Flexible Direct Inward Dialing (DID), or any other

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[871] 47 C.F.R. § 51.315(b); *see also Iowa Utils. Bd.*, 1997 WL 403401, at *28; *Local Competition Third Reconsideration Order* at para. 44.

[872] *See supra* para. 160.

[873] 47 U.S.C. § 271(c)(2)(B)(xi).

[874] *Id.*

[875] *Telephone Number Portability*, CC Docket No. 95-116, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 8352 (1996) *(Number Portability Order), pet. for review pending sub nom. U S WEST, Inc. v. FCC*, No. 97-9518 (10th Cir. filed Apr. 24, 1997), First Memorandum Opinion and Order on Reconsideration, FCC 97-74 (rel. Mar. 11, 1997) *(Number Portability First Reconsideration Order), pet. for review pending sub nom. Bell Atlantic Nynex Mobile, Inc. v. FCC*, No. 97-9551 (10th Cir. filed July 30, 1997), *recon. pending.*

> comparable and technically feasible method, as soon as reasonably possible upon receipt of a specific request from another telecommunications carrier, until such time as the LEC implements a long-term database method for number portability in that area.[876]

339. Ameritech claims that it meets the requirements of checklist item (xi) because it is providing interim number portability to competing carriers primarily via Remote Call Forwarding and Direct Inward Dialing and "plans to begin implementation of long-term number portability in Michigan in the fourth quarter of 1997."[877] The Michigan Commission states that "[i]nterim number portability (INP) continues to be available via remote call forwarding and direct inward dialing . . . . As of April 30, 1997, Ameritech represents over 24,000 numbers have been ported in Michigan."[878] The Michigan Commission further notes that "[i]mplementation of true or long-term number portability in Michigan is to take place when implementation in Illinois takes place."[879] Based on the foregoing, the Michigan Commission concludes that "[i]t appears Ameritech complies with check list item (xi)."[880] The Department of Justice did not evaluate Ameritech's showing on this checklist item.

340. AT&T, Brooks Fiber, and Sprint raise a number of factual and legal issues on the record regarding Ameritech's provision of number portability. Specifically, these parties contend that Ameritech fails to comply with its obligation to provide number portability by: (1) not offering Route Index - Portability Hub as an interim number portability method;[881] (2) delaying for more than a year the provision of Direct Inward Dialing with signalling using Signalling System 7 (SS7) protocol;[882] and (3) using interim rates for number portability, pending the Michigan Commission's decision on the appropriate cost recovery for number portability.[883]

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[876] *Number Portability Order*, 11 FCC Rcd at 8481; 47 C.F.R. § 52.7(a).

[877] Ameritech Application at 51-52; Ameritech Application, Vol. 2.3, Edwards Aff. at 72; *see also* Michigan Consultation at 48-49. For a description of these and other methods of providing number portability, see *Number Portability Order*, 11 FCC Rcd at 8494-8500.

[878] Michigan Commission Consultation at 48.

[879] *Id.* at 49.

[880] *Id.*

[881] AT&T Comments at 29-30; AT&T Comments, Vol.VIII, Tab H, Evans Aff. at 9-10; AT&T Reply Comments at 14-15.

[882] Brooks Fiber Comments at 32-33.

[883] Sprint Comments at 16-17.

341. In light of our conclusion that Ameritech does not satisfy other elements of the competitive checklist, we do not reach the merits of these allegations at this time. Nevertheless, we will examine carefully such disputes among the parties if they arise in any future section 271 application. As we recognized in the *Number Portability Order*, "number portability is essential to meaningful competition in the provision of local exchange services."[884] As a result, we will take very seriously any allegation that a BOC is failing to meet its current obligation to provide number portability through transitional measures pending deployment of a long-term number portability method.

342. Sprint also argues that Ameritech has failed to demonstrate that it will be able to implement long-term number portability.[885] Because number portability is critical to the development of meaningful competition, we must be confident that the BOC will meet its obligations to deploy long-term number portability consistent with the Commission's deployment schedule, as modified in the Commission's *Number Portability First Reconsideration Order*.[886] When reviewing a section 271 application, we will examine carefully the status of the BOC's implementation of a long-term number portability method. It is not sufficient for an applicant to assert summarily in its application that it plans to deploy long-term number portability, without providing adequate documentation that it has undertaken reasonable and timely steps to meet its obligations in this area. We would expect to review a detailed implementation plan addressing, at minimum, the BOC's schedule for intra- and inter-company testing of a long-term number portability method, the current status of the switch request process, an identification of the particular switches for which the BOC is obligated to deploy number portability, the status of deployment in requested switches, and the schedule under which the BOC plans to provide commercial roll-out of a long-term number portability method in specified central offices in the relevant state. We also would expect to review evidence demonstrating that the BOC will provide nondiscriminatory access to OSS to support the provision of number portability.

343. Finally, we note that, although our rules do not require a LEC to provide wide-scale commercial deployment of long-term number portability prior to the deadline for the relevant phase in our deployment schedule, any carrier that chooses to deploy long-term number portability on a flash-cut basis at a time close to the deadline for a particular phase will not be in a position to request an extension of the deadline if unforeseen problems arise upon commercial deployment. Our rules specify that "[i]n the event a carrier . . . is unable to meet the Commission's deadlines for implementing a long-term number portability method, it may file with the Commission *at least 60 days in advance of the deadline* a petition to extend

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[884] *Number Portability Order*, 11 FCC Rcd at 8367.

[885] Sprint Comments at 23-24.

[886] *Number Portability First Reconsideration Order* at paras. 48, 78-99, 104-107, and Appendix E.

the time by which implementation in its network will be completed."[887] Any BOC that is unable to meet its long-term number portability implementation obligations, and has failed to file in a timely fashion a request for an extension of the deadline, would not be deemed in compliance with item (xi) of the competitive checklist.

VII. COMPLIANCE WITH SECTION 272 REQUIREMENTS

A. Introduction

344. In light of our conclusion that Ameritech has not fully implemented the competitive checklist, as required by section 271(d)(3)(A), we need not address whether Ameritech has satisfied the other requirements of section 271(d)(3). Nevertheless, because section 271(d)(3)(B) sets forth a separate determination that we must make to approve an application, we believe it is appropriate to decide whether Ameritech has complied with the requirements of this provision. Section 271(d)(3)(B) provides that the Commission shall not approve a BOC's application for authorization to provide interLATA services unless the BOC demonstrates that "the requested authorization will be carried out in accordance with the requirements of section 272."[888] Section 272 requires a BOC to provide certain interLATA telecommunications services through a separate affiliate, and establishes structural and nondiscrimination safeguards that are designed to prevent anticompetitive discrimination and cost-shifting.[889]

345. As we observed in the *Non-Accounting Safeguards Order*, "BOC entry into in-region interLATA services raises issues for competition and consumers, even after a BOC has satisfied the requirements of section 271(d)(3)."[890] We further noted that:

> a BOC may have an incentive to discriminate in providing exchange access services and facilities that its affiliate's rivals need to compete in the interLATA telecommunications services and information services markets. For example, a BOC may have an incentive to degrade services and facilities furnished to its affiliate's rivals, in order to deprive those rivals of efficiencies that its affiliate enjoys. Moreover, to the extent carriers offer both local and interLATA services as a bundled offering, a BOC that discriminates against the

[887] 47 C.F.R. § 52.31(d) (emphasis added).

[888] 47 U.S.C. § 271(d)(3)(B).

[889] *See Non-Accounting Safeguards Order*, 11 FCC Rcd at 21913-14.

[890] *Id.* at 21911-12.

rivals of its affiliates could entrench its position in local markets by making these rivals' offerings less attractive.[891]

346. For these reasons, Congress required us to find that a section 271 applicant has demonstrated that it will carry out the requested authorization in accordance with the requirements of section 272.[892] We view this requirement to be of crucial importance, because the structural and nondiscrimination safeguards of section 272 seek to ensure that competitors of the BOCs will have nondiscriminatory access to essential inputs on terms that do not favor the BOC's affiliate.[893] These safeguards further discourage, and facilitate detection of, improper cost allocation and cross-subsidization between the BOC and its section 272 affiliate.[894] These safeguards, therefore, are designed to promote competition in all telecommunications markets, thereby fulfilling Congress' fundamental objective in the 1996 Act.

347. Section 271(d)(3)(B) requires the Commission to make a finding that the BOC applicant will comply with section 272, in essence a predictive judgment regarding the future behavior of the BOC. In making this determination, we will look to past and present behavior of the BOC applicant as the best indicator of whether it will carry out the requested authorization in compliance with the requirements of section 272. Moreover, section 271 gives the Commission the specific authority to enforce the requirements of section 272 after in-region interLATA authorization is granted.[895]

348. For the reasons set forth below, we conclude that, based on its current and past behavior, Ameritech has failed to demonstrate that it will carry out the requested authorization in accordance with the requirements of section 272. In addition, we indicate areas of concern that we may examine more closely when Ameritech files another application pursuant to section 271 in the future. To the extent this Order does not expressly address every section 272-related issue raised in the context of this application, we make no findings with respect to those issues.

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[891] *Id.* at 21912.

[892] 47 U.S.C. § 271(d)(3)(B).

[893] *See Non-Accounting Safeguards Order*, 11 FCC Rcd at 21913.

[894] *See Accounting Safeguards Order*, 11 FCC Rcd at 17546, 17550.

[895] 47 U.S.C. § 271(d)(6).

B. Compliance with Section 272(b)(3) Requirements

1. Introduction

349. Section 272(b)(3) requires that ACI (Ameritech's in-region interLATA affiliate) and Ameritech Michigan (the local exchange company) "have separate officers, directors, and employees . . . ."[896] Ameritech claims that it satisfies this obligation, stating that ACI and Ameritech Michigan (as well as all other Ameritech Bell operating companies) each "has no board of directors" and, as a result, ACI complies with the separate director requirement.[897] Ameritech's affiant Patrick J. Earley states that "[n]either ACI nor any of the AOCs currently has a Board of Directors," and therefore "no director of ACI is also a director of an AOC."[898]

350. Several parties argue that Ameritech's application is deficient because Ameritech Michigan and ACI do not have separate boards of directors.[899] These parties argue that because Ameritech Corporation apparently manages both Ameritech Michigan and ACI, ACI lacks the kind of independent decision-makers Congress demanded. In particular, Sprint argues that ACI is ultimately managed by the same board of directors that controls Ameritech Michigan.[900] Sprint points out that, pursuant to ACI's certificate of incorporation, Ameritech Corporation, ACI's sole shareholder, controls the business of ACI, and that Ameritech Corporation "'may exercise all such powers of the corporation and do all such lawful acts and things as the corporation [ACI] might do.'"[901] Disputing Ameritech's argument that the absence of *any* directors for ACI and Ameritech is sufficient to be in compliance with section 272(b)(3), KMC Telecommunications argues that, absent Ameritech's explanation of the management structure it employs in lieu of a board of directors, the Commission must assume that both subsidiaries operate by direct stockholder management, and therefore Ameritech Michigan's and ACI's shareholder, Ameritech Corporation, manages both those companies.[902]

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[896] *Id.* § 272(b)(3). We note that section 272(b)(3) directly refers to the 272 affiliate and the "Bell operating company." Section 3(4) of the Act explicitly states that "Michigan Bell Telephone Company" and its successor (Ameritech Michigan) is a "Bell operating company." *Id.* § 153(4).

[897] Ameritech Application at 57, and Vol. 2.2, Earley Aff. at 10-13.

[898] Ameritech Application, Vol. 2.2, Earley Aff. at 10.

[899] KMC Telecommunications Comments at 10-12; Sprint Comments at 25-28; MFS WorldCom Comments at i, 45-46.

[900] Sprint Comments at 25.

[901] Sprint Comments at 25 n.57.

[902] KMC Telecommunications Comments at 11-12.

351. These parties argue that the separate board requirement of section 272(b)(3) represents Congress' determination that separation is necessary to ensure that the interLATA subsidiary is run independently of the BOC.[903] KMC and MFS WorldCom also state that Congress deliberately decided not to allow the Commission to waive this requirement.[904] Sprint argues that independence is critical because directors owe an unyielding fiduciary duty to the corporation, have a duty to monitor the corporation in order to ensure that it is run according to the law, and have a duty to make decisions on behalf of that company.[905] TCG expresses concern that ACI has shared employees and officers with other Ameritech affiliates.[906] TCG also asserts that the reporting relationships between ACI, Ameritech Michigan and Ameritech Corporation are interdependent, because the Presidents of Ameritech and ACI report to the same Ameritech Corporation Vice President and that Ameritech Vice President-Regulatory reports to the same Ameritech Corporation Vice President as the ACI Regulatory Director.[907]

352. Ameritech responds to these arguments by stating that Ameritech Michigan and ACI "are not required" to have separate directors under section 272(b)(3) or the Commission's rules implementing that provision, and therefore the fact that these entities both have *no* directors indicates compliance with this provision.[908] Ameritech also states that the requirement of separate directors is "to guard against improper commingling between a BOC and its long distance affiliate, not to impose an affirmative obligation for each to form its own board of directors."[909] Ameritech also responds to TCG's contentions regarding ACI and Ameritech Michigan's reporting relationships. Ameritech states that although Ameritech Michigan's Vice President-Regulatory used to report to the same Ameritech Corporation Vice President as ACI's Regulatory Director, that is no longer the case. Instead, the Ameritech Michigan Vice President-Regulatory reports to the President of Ameritech Michigan and to a Senior Vice President of Ameritech Corporation. According to Ameritech, the position of Regulatory Director at ACI has been eliminated, and those responsibilities have been

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[903] Sprint Comments at 26-27; KMC Telecommunications Comments at 11-12; MFS WorldCom Comments at 45-46.

[904] KMC Telecommunications Comments at 12; MFS WorldCom Comments at 45-46.

[905] Sprint Comments at 26-27.

[906] TCG Comments at 28.

[907] *Id.* at 33-35.

[908] Ameritech Reply Comments at 24-25; Letter from Gary L. Phillips, Director of Legal Affairs, Ameritech, to William F. Caton, Acting Secretary, Federal Communications Commission, at 1 (Aug. 5, 1997) (Ameritech August 5 Letter).

[909] Ameritech Reply Comments at 25.

transferred to the ACI General Counsel, who reports to the President of ACI and Ameritech Corporation's General Counsel. Ameritech acknowledges, however, that the President of Ameritech Michigan and the President of ACI report to the same Executive Vice President of Ameritech Corporation.[910]

2. Discussion

353. We conclude that Ameritech's corporate structure is not in compliance with the section 272(b)(3) requirement that its interLATA affiliate (ACI) maintain "separate" directors from the operating company (Ameritech Michigan). In particular, we find that under Delaware and Michigan corporate law, Ameritech Corporation has the duties, responsibilities, and liabilities of a director for both ACI and Ameritech Michigan. As a result, ACI lacks the independent management that Congress clearly intended in enacting the separate director requirement.

354. As Ameritech describes in its application, ACI is a Delaware close corporation, originally incorporated in 1994 as "Ameritech Global Link, Inc." (changed in 1995 to "Ameritech Communications, Inc.", or "ACI").[911] Ameritech states that the stock of ACI is 100 percent owned by Ameritech Corporation.[912] Ameritech Michigan is a Michigan close corporation, originally incorporated in 1904 as the "Michigan State Telephone Company."[913] Ameritech Corporation owns 100 percent of Ameritech Michigan's stock.[914] The certificates of incorporation of both companies do not provide for boards of directors.[915]

355. Ameritech argues that ACI, being a closely-held corporation, is not required by Delaware law to have a separate board of directors.[916] Ameritech also argues that it is not

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[910] Ameritech Reply Comments, Vol 5R.14, LaSchiazza Reply Aff. at 5-6, and Vol 5R.5, Earley Reply Aff. at 5-6.

[911] Ameritech Application, Vol. 2.2, Earley Aff., Attachments 1-2.

[912] *Id.*, Vol. 2.2, Earley Aff. at 4; Ameritech August 5 Letter at 2.

[913] *See* Letter from Gary L. Phillips, Director of Legal Affairs, Ameritech, to William F. Caton, Acting Secretary, Federal Communications Commission, Articles of Association of the Michigan State Telephone Company, dated Jan. 26, 1904 (August 1, 1997) (Ameritech August 1 Letter). The predecessor to Ameritech Corporation originally had a board of directors of five people. *Id.* at Article 7.

[914] Ameritech August 5 Letter at 2; Ameritech August 1 Letter, Articles of Association of the Michigan State Telephone Company, Article VIII, as amended on March 27, 1990 (list of stockholders).

[915] *See* Ameritech Application, Vol. 2.2, Earley Aff., Attachments 1-2; Ameritech August 1 Letter, Articles of Association of the Michigan State Telephone Company.

[916] Ameritech August 5 Letter at 2.

required by section 272(b)(3) or Commission rule to have a board of directors for ACI.[917] The implication of this argument is that, because there are no formal directors for ACI, the separate director requirement of section 272(b)(3) is not at issue. We agree with Ameritech that section 272 and our rules do not require that ACI maintain any particular form of corporate organization. However, the relevant state corporate law of Delaware and Michigan assign the responsibilities and liabilities of directors to shareholders under the form of organization that Ameritech has chosen for ACI and Ameritech Michigan.

356. We believe that in passing section 272(b)(3), with its express reference to corporate "directors," Congress clearly intended for the Commission to read section 272(b)(3) in concert with relevant state law regarding corporate governance. Therefore, to the extent that state corporate law deems or imposes upon other entities the responsibilities of corporate directors in the absence of a formal board, we believe that section 272(b)(3) requires that those other entities be "separate." Since ACI is incorporated pursuant to Delaware law and Ameritech Michigan is incorporated pursuant to Michigan law, we must look to Delaware and Michigan corporate law to determine whether ACI has "separate" directors from Ameritech Michigan.

357. Ameritech correctly argues that Delaware law does not require that a "closely held" corporation, such as ACI, maintain a separate board of directors.[918] Section 351 of the Delaware General Corporate Law states that "[t]he certificate of incorporation of a close corporation may provide that the business of the corporation shall be managed by the stockholders of the corporation rather than by a board of directors."[919] Section 7 of the Articles of Incorporation of Ameritech Global Link, Inc. (later renamed ACI) states that "the business of the corporation shall be managed by the stockholders of the corporation rather than a board of directors, as permitted under section 351 . . . ."[920]

358. In the event that a close corporation does not appoint a board of directors, Delaware law establishes that the shareholders of close corporations adopting this management structure are deemed directors for purposes of corporate governance and liability. Section 351(2) states that the stockholders of such a corporation "shall be deemed to be directors for

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[917] In support of its position, Ameritech relies on our *Non-Accounting Safeguards Order*, in which we stated, "the arguments of the BOCs that the section 272(b)(3) requirement that a BOC and a section 272 affiliate have separate officers, directors, and employees simply dictates that the same person may not simultaneously serve as an officer, director, or employee of both a BOC and its section 272 affiliate." Ameritech Reply Comments at 24 (quoting *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21990).

[918] Del. Code Ann. tit. 8, § 342 (1996) (defining "close corporation").

[919] *Id.* tit. 8, § 351 (1996).

[920] Ameritech Application, Vol. 2.2, Earley Aff., Attachment 1 (Section 7 of the Certificate of Incorporation of Ameritech Global Link, Inc. (June 28, 1994) (later renamed Ameritech Communications, Inc.)).

purposes of applying provisions of this chapter," and section 351(3) states that "[t]he stockholders of the corporation shall be subject to all liabilities of directors."[921] Indeed, section 7 of the ACI Certificate of Incorporation restates these obligations of the stockholders of ACI and designates the stockholders of ACI as directors for purposes of Delaware law and for director liability.[922] Therefore, we conclude that Ameritech Corporation (the sole shareholder of ACI) is, by operation of Delaware corporate law, the "director" of ACI.[923]

359. The same result holds for Ameritech Michigan. As indicated above, Ameritech Michigan is incorporated pursuant to Michigan corporate law, and Ameritech Corporation is the sole shareholder of Ameritech Michigan.[924] Like Delaware law, Michigan law permits corporations to elect direct management by the shareholders in lieu of appointing a board of directors.[925] Michigan law also imposes upon the shareholders of such a corporation the responsibilities and liabilities of corporate directors. In particular, section 450.1463(3) of the Michigan Compiled Laws states that, if the articles of incorporation do not create a board, that action "impose[s] upon the shareholders the liability for managerial acts or omissions that is imposed on directors by law . . . ."[926] Therefore, we conclude that, in effect, Ameritech Corporation is, by operation of Michigan corporate law, the "director" of Ameritech Michigan. Because Ameritech Corporation has the managerial obligations and liabilities of a director of both ACI and Ameritech Michigan, ACI does not satisfy the requirement of section 272(b)(3) that it have "separate . . . directors . . . from the Bell operating company of which it is an affiliate."

360. Ameritech argues that Michigan corporate law does not explicitly "deem" Ameritech Corporation to be a director, but only "impose[s]" director responsibilities on Ameritech Corporation. Accordingly, Ameritech concludes that, even as a legal matter,

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[921] Del. Code Ann. tit. 8, §§ 351(2)-(3) (1996).

[922] *See* Ameritech Application, Vol. 2.2, Earley Aff., Attachment 1 (Certificate of Incorporation).

[923] Ameritech appears to agree with this finding. *See* Ameritech August 5 Letter at 2 ("[P]ursuant to ACI's certificate of incorporation and Section 351, Ameritech Corporation 'shall be deemed to be' ACI's director for purposes of Delaware corporate law.").

[924] *See* Ameritech August 1 Letter, Articles of Association of the Michigan Bell Telephone Company (Ameritech Michigan), Articles VI, VIII, as amended on March 27, 1990; Ameritech August 5 Letter at 2.

[925] Mich. Comp. Laws Ann. § 450.1463(1) (1996) ("[T]he articles of incorporation may provide that there shall not be a board . . .").

[926] *Id.* § 450.1463(3) (1996). *See also* Article VI of Articles of Association of Ameritech Michigan ("The effect of this provision is to impose upon the shareholders the liability for managerial acts or omissions that is imposed on directors by law."). Ameritech August 1 Letter, Articles of Association of the Michigan Bell Telephone Company (Ameritech Michigan), Article VI, as amended on March 27, 1990.

Ameritech Michigan and ACI do not have the same directors.[927] We are not persuaded by Ameritech's argument, and we do not consider the assignment of director obligations and liabilities of Ameritech Michigan and ACI to Ameritech Corporation to be a "purely formal matter."[928] By requiring that the BOC and the interLATA affiliate have "separate" directors, Congress required that there be some form of independent management and control of the two entities. As a general matter of corporate law, directors have the formal legal power to manage the corporation.[929] The separation between shareholders and directors in modern corporations reflects the separation of ownership and management that the corporate structure offers.[930] The corporate law of some states such as Delaware and Michigan recognizes that, for closely-held corporations, ownership and control need not be separated and permits shareholders to manage and control the corporation directly.[931] Although Michigan law does not formally "deem" the shareholders of such a corporation to be directors, those shareholders do have the managerial obligations and liabilities of directors "impose[d]" on them. Therefore, the legal and practical effect of both the Delaware and Michigan statutes is to effectively *transfer* the management duties and liabilities of directors to the shareholders of the corporation when a corporation chooses this form of corporate governance.

361. We recognize that corporations are ultimately responsible to their shareholders and that, in the context of any parent-subsidiary relationship, complete independence of management of the subsidiary will not always be possible.[932] However, in enacting section 272(b)(3), Congress obviously required that the BOC and the interLATA affiliate be separately managed to at least some degree, and one of the affirmative requirements of that provision is the separate director requirement. Since Delaware and Michigan law impose on Ameritech Corporation -- the sole shareholder of both ACI and Ameritech Michigan -- the responsibilities of a "director" of both corporations, we conclude that Ameritech's application

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[927] Ameritech August 5 Letter at 2 ("Even if Ameritech Corporation is deemed, as a purely formal matter under Delaware law, to be ACI's director, Ameritech Corporation is *not* deemed to be Ameritech Michigan's director. Thus, there is no overlapping director problem under Section 272(b)(3).").

[928] *See id.*

[929] *See, e.g.*, Del. Code Ann. tit. 8, § 141(a) (1996); Mich. Comp. Laws Ann. § 450.1501 (1996) ("The business and affairs of a corporation shall be managed by or under the direction of its board, except as otherwise provided in this act or in its articles of incorporation."); Robert C. Clark, *Corporate Law* § 3.2.1 (1986); *see also Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985); *Ayres v. Hardaway*, 303 Mich. 589, 594, 6 N.W.2d 905. 970 (Mich. 1942); Craig W. Palm & Mark A. Kearney, "A Primer on the Basics of Directors' Duties in Delaware: The Rules of the Game (Part I)," 40 Vill. L. Rev. 1297, 1300 (1995).

[930] *See* Clark, *Corporate Law* at § 1.2.4.

[931] *Id.* at § 1.3.

[932] *See* Ameritech August 5 Letter at 3.

is not in accordance with section 272(b)(3). Simply because state law permits Ameritech to vest traditional director duties and liabilities in the shareholders of these corporations does not relieve Ameritech of the 272(b)(3) obligation that the entities that possess those rights and obligations of directors to be separate entities. In short, we find that Congress intended that its separate director requirement not be easily nullified merely through a legal fiction.

362. We do not find it necessary to examine in detail the various corporate reporting relationships that TCG and Ameritech debate in their pleadings to find that Ameritech does not comply with section 272(b)(3).[933] The fact, however, that the Presidents of both Ameritech Michigan and ACI report to the same Ameritech Corporation Executive Vice President, as Ameritech acknowledges, underscores the importance of the separate directors requirement. Generally, corporate officers report to their board of directors, and, in the case of the BOC interLATA affiliate, that board is to be a separate body than the BOC's board. Given that the principal corporate officers of Ameritech Michigan and ACI report to the same Ameritech Corporation officer, it is clear that as a practical matter (as well as a matter of law), Ameritech Corporation is the corporate director for both Ameritech and ACI.

C. Compliance with Section 272(b)(5) Requirements

1. Introduction

363. Section 272(b)(5) of the Communications Act provides that the BOC's section 272 affiliate "shall conduct all transactions with the Bell operating company of which it is an affiliate on an arm's length basis with any such transactions reduced to writing and available for public inspection."[934] To satisfy the requirement that transactions between a BOC and its section 272 affiliate be "reduced to writing and available for public inspection," the *Accounting Safeguards Order* requires the section 272 affiliate, "at a minimum, to provide a detailed written description of the asset or service transferred and the terms and conditions of the transaction on the Internet within 10 days of the transaction through the company's home page."[935] In addition, this information concerning the transaction "must also be made available for public inspection at the principal place of business of the BOC."[936] We further determined that "the description of the asset or service and the terms and conditions of the

[933] *See* TCG Comments at 33-35; Ameritech Reply Comments, Vol 5R.14, LaSchiazza Reply Aff. at 5-6, and Vol 5R.5, Earley Aff. at 5-6.

[934] 47 U.S.C. § 272(b)(5).

[935] *Accounting Safeguards Order*, 11 FCC Rcd at 17593.

[936] *Id.*

transaction should be sufficiently detailed to allow us to evaluate compliance with our accounting rules."[937]

364. In its application, Ameritech asserts that it has complied, and will continue to comply, with the requirements of section 272(b)(5) and the *Accounting Safeguards Order*.[938] Ameritech states that, although the accounting and public disclosure requirements of the *Accounting Safeguards Order* were not scheduled to become effective until July 21, 1997, at the earliest,[939] Ameritech implemented the requirements on May 12, 1997.[940] Ameritech therefore maintains that it had implemented the requirements of the *Accounting Safeguards Order* before it filed its application, and that it currently complies with all the requirements of section 272(b)(5) and the *Accounting Safeguards Order*.[941]

365. AT&T and TCG contest this assertion, contending that Ameritech does not comply with the requirements of section 272(b)(5) and the *Accounting Safeguards Order*. AT&T argues that several of the transactions that Ameritech and ACI have publicly disclosed do not include rates. AT&T and TCG also argue that it appears that Ameritech and ACI have

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[937] *Id.*

[938] Ameritech Application at 58.

[939] The *Accounting Safeguards Errata* amended paragraph 268 of the *Accounting Safeguards Order* to include the following:

> [T]he requirements and regulations established in this decision with regard to part 32 of our Rules, 47 C.F.R. Part 32, shall become effective upon approval by OMB of the new information collection requirements adopted herein, but no sooner than six months after publication in the Federal Register [on January 21, 1997]. . . . The remaining new and/or modified information collections established in this Order shall become effective upon approval by OMB of the new information collection requirements adopted herein, but no sooner than thirty days after publication in the Federal Register.

Implementation of the Telecommunications Act of 1996; Accounting Safeguards Under the Telecommunications Act of 1996, CC Docket No. 96-150, Errata, 12 FCC Rcd 2993, 2993 (1997) (*Accounting Safeguards Errata*). The rules adopted in the *Accounting Safeguards Order* took effect on August 12, 1997. *See Accounting Safeguard Rule Changes Requiring OMB Approval Soon to be Effective*, Public Notice, DA 97-1669 (rel. Aug. 5, 1997); Accounting Safeguards Under the Telecommunications Act of 1996, 62 Fed. Reg. 43,122 (Aug. 12, 1997).

[940] Ameritech Application, Vol. 2.14, Shutter Aff. at 4-5; Ameritech Reply Comments, Vol.5R.25, Shutter Reply Aff. at 5-6. We encouraged, but did not require, BOCs to implement the requirements before the rules' effective date. *Accounting Safeguards Errata*, 12 FCC Rcd at 2993.

[941] Ameritech Reply Comments at 23-24.

not disclosed all of their transactions with each other, including those related to preparations by ACI to enter the interLATA market.[942]

2. Discussion

366. As discussed above, section 271(d)(3)(B) requires the Commission to make a predictive judgment regarding the future behavior of a section 271 applicant. We further indicated that the past and present behavior of the BOC applicant is highly relevant to this assessment. Ameritech maintains that, since May 12, 1997, it has complied fully with section 272(b)(5) and the requirements in the *Accounting Safeguards Order*, even those requirements that were not in effect on that date. Because Ameritech asserts that it has complied with the *Accounting Safeguards Order*, we examine Ameritech's compliance with the requirements adopted in that order. We emphasize, however, that we examine Ameritech's asserted compliance with the requirements in the *Accounting Safeguards Order* that had not yet taken effect on the date of Ameritech's application only as an indicator of Ameritech's future behavior.

367. After examining the record evidence in this proceeding, we conclude that Ameritech has failed to demonstrate that it will carry out the requested authorization in accordance with section 272(b)(5), because it has failed to disclose publicly the rates for all of the transactions between Ameritech and ACI. Moreover, it appears that Ameritech and ACI have not disclosed publicly all of their transactions as required by section 272(b)(5). Accordingly, if Ameritech continues its present behavior, and does not remedy these problems, it would not be in compliance with the requirements of section 272(b)(5).

368. In response to AT&T's assertion that Ameritech has not disclosed rates for transactions between Ameritech and ACI, Ameritech maintains that "there is no requirement in the *Accounting Safeguards Report and Order* to disclose rates for services to ensure compliance with the Commission's accounting rules."[943] Rather, Ameritech argues that "the specific requirement is to provide a '. . . detailed written description of the asset or service transferred and the terms and conditions of the transaction . . . .'"[944] Ameritech further maintains that the terms and conditions of the transaction include only the valuation rules that

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[942] AT&T Comments at 37-39; AT&T Comments, Vol. XII, Exh. O, Goodrich and McClelland Joint Aff. at 11-25; TCG Comments at 29, 31-32, 35-36; *see also* Department of Justice Evaluation at 28 (stating that the lack of information available regarding transactions between Ameritech and ACI "raises questions about whether Ameritech has sufficiently documented the affiliated transactions to allow detection of discrimination, cross-subsidization, or any other anticompetitive behavior.").

[943] Ameritech Reply Comments, Vol. 5R.25, Shutter Reply Aff. at 7.

[944] *Id.*, Vol. 5R.25, Shutter Reply Aff. at 7 (citing *Accounting Safeguards Order*, 11 FCC Rcd at 17593).

will be applied to the transaction, and do not include the actual rates.[945] Ameritech therefore argues that it has complied with the requirements of section 272 and the *Accounting Safeguards Order* by posting the terms and conditions of the transaction, including a description of the valuation method used, but not the actual rates.[946]

369. We find, contrary to Ameritech's claim, that our *Accounting Safeguards Order* requires Ameritech to disclose the actual rates for its transactions with its section 272 affiliate. Ameritech's argument fails to acknowledge the *Accounting Safeguards Order*'s directive that "the description of the asset or service and the terms and conditions of the transaction should be sufficiently detailed to allow us to evaluate compliance with our accounting rules."[947] Instead, Ameritech appears to be relying on the terminology in the Commission's *Joint Cost Order* for describing affiliate transactions in a cost allocation manual (CAM), which specifically stated that disclosure of the price of a transaction was not necessary.[948] In the *Accounting Safeguards Order*, however, we expressly stated that the information contained in a BOC's CAM is not sufficiently detailed to satisfy section 272(b) because the BOC's CAM contains only a general description of the asset or service and does not describe the terms and conditions of each individual transaction.[949] Therefore, a statement of the valuation method used, without the details of the actual rate, does not provide the specificity we required in the *Accounting Safeguards Order*. Because Ameritech has failed to provide a sufficiently detailed description of the transactions to allow us to evaluate compliance with our accounting rules, we are unable to find that Ameritech will carry out the requested authorization in accordance with section 272.

370. In addition, we are concerned about the complaint that Ameritech has failed to disclose all of the transactions between Ameritech and ACI. Ameritech responds that it has disclosed on its Internet website all transactions entered into between Ameritech and ACI that occurred on or after May 12, 1997, and all transactions entered into prior to that date that were still in effect on that date.[950] Ameritech further maintains that all transactions entered into between these parties and concluded prior to May 12, 1997, were accounted for in

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[945] *Id.*, Vol. 5R.25, Shutter Reply Aff. at 7.

[946] *See id.*, Vol. 5R.25, Shutter Reply Aff. at 6-7.

[947] *Accounting Safeguards Order*, 11 FCC Rcd at 17593.

[948] *Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities*, CC Docket No. 86-111, Report and Order, 2 FCC Rcd 1298, 1304, 1328 (1987) (*Joint Cost Order*), *recon.*, 2 FCC Rcd 6283, *further recon.*, 3 FCC Rcd 6701, *aff'd sub nom. Southwestern Bell Corp. v. FCC*, 896 F.2d 1378 (D.C. Cir. 1990).

[949] *Accounting Safeguards Order*, 11 FCC Rcd at 17594.

[950] Ameritech Reply Comments, Vol. 5R.25, Shutter Reply Aff. at 5-6.

accordance with the Commission's existing accounting rules.[951] Ameritech, however, does not affirmatively state that this latter group of transactions was disclosed publicly.

371. Although BOCs need not comply with the requirements we adopted in the *Accounting Safeguards Order* prior to the effective date of that order, BOCs were still obligated to comply with the statute as of the date it was enacted. Section 272(b)(5) expressly states that all transactions between a BOC and its section 272 affiliate shall be "available for public inspection."[952] Consequently, although Ameritech and ACI need not disclose transactions in the manner specified in the *Accounting Safeguards Order* prior to that order's effective date, Ameritech and ACI must make those transactions available for public inspection in some manner, as required by section 272(b)(5). Accordingly, in order to demonstrate compliance with section 272(b)(5) in a future application, we expect that Ameritech and ACI will make available for public inspection all transactions between them that occurred after February 8, 1996.

372. Furthermore, Ameritech maintains that "transactions entered into between ACI and any of its non-BOC affiliates not involving the BOC affiliates are not required to be disclosed on Ameritech's Internet website nor are they required to be made available for public inspection."[953] We note that Ameritech has established two divisions that will process orders for network elements and wholesale services, Ameritech Information Industry Services (AIIS) and Ameritech Long Distance Industry Services (ALDIS).[954] AIIS offers, at wholesale, "services for resale and network components" to competing telecommunications carriers and to ACI.[955] Ameritech states that "ALDIS is an Ameritech business unit that serves as Ameritech's exclusive sales channel for the sale of switched and special access services to interexchange carriers," including ACI.[956]

373. We concluded in the *Non-Accounting Safeguards Order* that "a BOC cannot circumvent the section 272 requirements by transferring local exchange and exchange access facilities and capabilities to an affiliate."[957] We therefore determined that, "if a BOC transfers

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[951] Ameritech Application, Vol. 2.14, Shutter Aff. at 4; Ameritech Reply Comments, Vol. 5R.25, Shutter Reply Aff. at 6 n.9.

[952] 47 U.S.C. § 272(b)(5).

[953] Ameritech Reply Comments, Vol. 5R.25, Shutter Reply Aff. at 6.

[954] Ameritech Application, Vol. 2.2, Earley Aff. at 15.

[955] *Id.*, Vol. 2.10, Mickens Aff. at 1-2.

[956] *Id.*, Vol. 2.6, Kriz Aff. at 1.

[957] *Non-Accounting Safeguards Order*, 11 FCC Rcd at 22054.

to an affiliated entity ownership of any network elements that must be provided on an unbundled basis pursuant to section 251(c)(3), we will deem such entity to be an 'assign' of the BOC under section 3(4) of the Act with respect to those network elements. Any successor or assign of the BOC is subject to the section 272 requirements in the same manner as the BOC."[958] We do not have adequate information in the record to determine whether Ameritech has transferred local exchange and exchange access facilities and capabilities to AIIS or ALDIS. We expect that, in any future section 271 application, Ameritech will state whether it has transferred to AIIS or ALDIS, at any time, any network facilities that are required to be unbundled pursuant to section 251(c)(3), and if so, the timing and terms of any such transfer. If Ameritech has transferred facilities and capabilities such that AIIS or ALDIS is a successor or assign of Ameritech, we expect Ameritech to disclose the transactions between these divisions and ACI, in compliance with section 272(b)(5) and our implementing rules.

VIII. OTHER CONCERNS RAISED IN THE RECORD

374. Several other issues have arisen in the context of Ameritech's application. These issues are based on allegations made by various commenters that Ameritech has violated certain Commission rules and has engaged in anticompetitive conduct. These issues include Ameritech's inbound telemarketing script, its provision of intraLATA toll service, and its compliance with the customer proprietary network information (CPNI) requirements of section 222. As we discuss in Section IX below, evidence that a BOC applicant has violated federal telecommunications regulations or engaged in anticompetitive conduct is relevant to our inquiry under section 271, and would be considered in the public interest analysis to the extent it arises in future applications.[959]

375. With respect to its inbound telemarketing script, Ameritech states that, once it receives section 271 authorization, when a customer calls Ameritech to establish new local exchange service or switch the location of its existing service, Ameritech's service representative will inform the customer:

> You have a choice of companies, including Ameritech Long Distance, for long distance service. Would you like me to read from a list of other available long distance companies or do you know which company you would like?[960]

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[958] *Id.*

[959] As discussed *infra* Section IX, we do not address Ameritech's public interest showing, but highlight here some issues raised in the context of this application in order to provide further guidance to Ameritech.

[960] Ameritech Application, Vol. 2.2, Earley Aff., Schedule 7. Ameritech states that, in accordance with the Commission's accounting rules, ACI will reimburse Ameritech Michigan for the time spent by the Ameritech Michigan service representative to mention "Ameritech Long Distance" and its services when reciting the script. *See id.*, Vol. 2.2, Early Aff. at 19.

If the customer chooses Ameritech Long Distance or another long distance company, the order will be processed accordingly. If the customer requests a listing or telephone numbers of other available companies, the service representative will read from the entire list and ask the customer for its choice of long distance carrier.[961]

376. We conclude that this script, if actually used by Ameritech, would violate the "equal access" requirements of section 251(g). Mentioning only Ameritech Long Distance unless the customer affirmatively requests the names of other interexchange carriers is inconsistent on its face with our requirement that a BOC must provide the names of interexchange carriers in random order.[962] Such a practice would allow Ameritech Long Distance to gain an unfair advantage over other interexchange carriers.[963] As explained in our *Non-Accounting Safeguards Order*, "the obligation to continue to provide such nondiscriminatory treatment stems from section 251(g) of the Act."[964] In that order, we concluded that a BOC must "provide any customer who orders new local exchange service with the names and, if requested, the telephone number of all the carriers offering interexchange services in its service area."[965] Moreover, we concluded that the "BOC must ensure that the names of the interexchange carriers are provided in random order."[966] Thus, not only are BOCs required to provide customers requesting new local exchange service the names of competing interexchange carriers, but they must provide these names in random order.

377. We also have concerns about allegations that Ameritech is effectively stifling competition in the local exchange market by refusing to provide intraLATA toll service to competing LEC customers.[967] Such actions on the part of Ameritech have led to the filing of

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[961] *Id.*, Vol. 2.2, Early Aff., Schedule 7.

[962] *See* Sprint Comments at 28-29 (maintaining that the listing of all interexchange carriers' names is mandatory, and Ameritech's script, by not listing the names of competing interexchange carriers, is designed to steer customers to Ameritech's long distance affiliate, ACI).

[963] *See* Sprint Comments at 28-30 (alleging that Ameritech's inbound telemarketing script is indicative of Ameritech's plan to exploit its local exchange monopoly power into the long distance market).

[964] *Non-Accounting Safeguards Order*, 11 FCC Rcd at 22046.

[965] *Id.*

[966] *Id.*

[967] *See* Michigan Commission Consultation at 56 ("Ameritech has . . . begun a process in Michigan of exiting certain portions of the intraLATA toll market."); Brooks Fiber Comments at 28, 33-34; LCI Comments at 24-25; MFS WorldCom Comments at 8 and Schroeder Aff. at 18-19; Michigan Attorney General Comments at 6.

several complaint proceedings before the Michigan Commission.[968] For example, in its complaint before the Michigan Commission, Brooks Fiber alleges that although Ameritech provides intraLATA toll service to customers of certain independent LECs that do not compete with Ameritech in its service area, it has refused to allow customers of Brooks Fiber's local exchange service to elect Ameritech for the provision of intraLATA toll services.[969] Ameritech, in its answer to Brooks Fiber's complaint, contends that whether to provide intraLATA toll service to Brooks Fiber customers is a management decision solely within the discretion of Ameritech.[970] In addition, Brooks Fiber, LCI, and MFS WorldCom allege that Ameritech has used its intraLATA "Value Link Calling Plus Plans" (ValueLink)[971] to lock in its customers to Ameritech as their local exchange provider.[972] For example, they claim that, if Ameritech ValueLink customers want to switch to a competing LEC for local service and still retain Ameritech for intraLATA toll service, they must terminate their ValueLink plan, which contain significant termination penalties,[973] in order to switch to

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[968] *Id.* These complaints were filed by Climax Telephone Company, Brooks Fiber, and Frontier Communications of Michigan on March 10, 1997, March 21, 1997, and April 18, 1997, respectively. The Michigan Commission states that, with respect to the Climax complaint, an arbitration panel determined that the Michigan Commission was empowered to order Ameritech to continue the provision of intraLATA toll services to Climax customers residing in Climax's Metro exchange. *Id.* at 56-57.

[969] Brooks Fiber Comments, Exh. I, Complaint of Brooks Fiber, Case No. U-11350, at 5. MCI filed a Petition for Leave to Intervene in Brooks Fiber's Complaint before the Michigan Commission. *See* LCI Comments at Exh. N. We note that, although Brooks Fiber and Ameritech have agreed to settle this dispute, the settlement has not been approved by the Michigan Commission. Brooks Fiber Comments at 28 n.50.

[970] *Id.*

[971] According to Ameritech, this is a volume and term discount contract that allows customers to obtain intraLATA toll service at a discounted rate based upon the commitment to purchase specific volumes of services for a specified period. Brooks Fiber Comments, Exh. I, Answer and Affirmative Defenses of Ameritech, Case No. U-11350 at 5. Brooks Fiber and LCI allege that this calling plan is a long-term agreement, varying in length from twelve to thirty-six months, in which the customer commits to a minimum monthly usage to secure a reduced rate for intraLATA toll calls. *See* Brooks Fiber Comments, Exh. I, Complaint of Brooks Fiber, Case No. U-11350 at 6-7; LCI Comments, Exh. K, Lockwood Declaration at 2.

[972] According to LCI, at least 50 to 60% of the available local business customer base in Michigan is on a ValueLink plan. *See* LCI Comments at 22-23 and Exh. K., Lockwood Declaration at 2. Ameritech, in a letter to LCI, denies that 50% of Ameritech's business customers are bound by long-term exclusivity agreements. Rather, Ameritech claims that "an extremely small share of the relevant market is subject to agreements which may be considered long-term in nature." *See* LCI Comments, Exh. O, Letter from Neil Cox, President, Ameritech Information Industry Services, to Anne K. Bingaman, LCI (June 9, 1997) (Cox Letter). In its reply, Ameritech questions LCI's percentages, but does not put forth any of its own. *See* Ameritech Reply Comments, Vol. 5R.6, Edwards Reply Aff. at 63.

[973] MFS WorldCom Comments, Schroeder Aff. at 18-19; Brooks Fiber Comments, Exh. I, Complaint of Brooks Fiber, Case No. U-11350, at 7-8; *see* LCI Comments, Exh.C, Charity Aff. at 7-8, and Exh. L, Letter from Anne K. Bingaman, Senior Vice President, LCI to Neil Cox, President, Ameritech Information Industry

another local service provider. In response, Ameritech asserts that it has put in place arrangements that will allow customers to switch to Brooks Fiber as their local carrier and retain their intraLATA toll service under their ValueLink plan and that it is "fully prepared to arrange similar solutions for other [competing LECs]."[974]

378. Despite Ameritech's assurances that it is willing to work out arrangements similar to the one it arranged for Brooks Fiber, it remains unclear from the record the extent to which this issue has been resolved. For example, although Ameritech appears to have implemented a solution for Brooks Fiber,[975] there is no evidence to suggest that it has implemented similar arrangements any other competing carriers. Regardless of how the Michigan Commission resolves the pending complaints, we have concerns that discontinuing or refusing to provide intraLATA toll service to customers that elect to switch to another local service provider may threaten a competing LEC's ability to compete effectively in the local market and thus may be inconsistent with the procompetitive goals of the 1996 Act. Moreover, we are also concerned about the potentially anticompetitive effects of Ameritech's ValueLink plans.

379. Raising a third issue, Brooks Fiber and CWA contend that Ameritech has instituted a "Winback program," pursuant to which Ameritech representatives call former Ameritech customers that have switched their local service to competing LECs to offer more competitive pricing packages.[976] Specifically, Brooks Fiber alleges that, after Brooks Fiber

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Services (June 5, 1997) (Bingaman Letter). LCI notes that it has "growing list of customers" whose orders for local exchange service have been placed on hold because the potential termination liability under the ValueLink is so high. LCI Comments at 22. For example, LCI contends that the 1997 version of Ameritech's ValueLink Plan locks customers into minimum revenue commitments of between $50,000 and $200,000 annually for two- or three-year terms. The termination charge in these contracts is the entire lifetime value of the contracts, with no discount. Accordingly, if an Ameritech ValueLink customer asks to switch to LCI after the first year of the ValueLink contract, either the customer or LCI must pay Ameritech $400,000 to switch local service to LCI. *Id.*, Exh. L, Bingaman Letter.

[974] *See* Ameritech Reply Comments, Vol. 5R.6, Edwards Aff. at 61, and Vol. 5R.10, Heltsley, Hollis, and Larsen Aff. at 26-27. As an exhibit to its comments, LCI submitted a letter from Ameritech to LCI that, without any explanation, states that "there is no tie of local service to Ameritech's ValueLink product because customers may, in a 2-PIC state, elect Ameritech as their intraLATA toll carrier while electing a different local exchange provider." *See* LCI Comments, Exh. O, Cox Letter.

[975] On reply, Ameritech submits a letter to Brooks Fiber dated May 29, 1997, stating that it is still in progress of implementing a solution. Ameritech also includes a *draft* letter dated June 11, 1997, from Ameritech to Brooks Fiber confirming implementation of a solution. Ameritech Reply Comments, Vol. 5R.6, Edwards Aff., Tab 37. In contrast, Brooks Fiber comments, filed on June 10, 1997, make no mention of a solution and reiterate its complaint that Ameritech refuses to accept intraLATA toll traffic from Brooks Fiber. *See* Brooks Fiber Comments at 33-34.

[976] Brooks Fiber Comments at 39-40; CWA Comments at 20-21.

has sent Ameritech requests for the customer service records of Ameritech customers, Ameritech retail sales representatives have telephoned those same customers.[977] We are concerned about Brooks Fiber's suggestion that Ameritech has misused confidential and proprietary information to gain a competitive advantage. We emphasize that Ameritech's use of customer information for marketing purposes must comply with section 222 of the Act and the Commission's implementing regulations.[978]

380. In the affidavits accompanying its application, Ameritech notes that some customers have authorized Ameritech to share CPNI with Ameritech affiliates (including ACI). Ameritech states, however, that ACI will not request or receive any CPNI from the Ameritech operating companies pursuant to such approval until the Commission issues its rules implementing section 222 of the Act, or ACI has obtained directly customer authorization to receive the information.[979] Like the Department of Justice, we support Ameritech's commitment and believe that it is necessary pending the Commission's adoption of regulations clarifying Ameritech's obligations under section 222 of the Act.[980]

IX. PUBLIC INTEREST

381. In the preceding sections of this Order, we concluded that Ameritech has not implemented fully the competitive checklist and has not complied with the requirements of section 272. We, therefore, must deny Ameritech's application for authorization to provide in-region, interLATA telecommunications services in Michigan. As a result, we need not reach the further question of whether the requested authorization is consistent with the public interest, convenience and necessity, as required by section 271(d)(3)(C). We believe, however, that, provided the competitive checklist, public interest, and other requirements of section 271 are satisfied, BOC entry into the long distance market will further Congress'

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[977] *See* Brooks Fiber Comments at 39-40; *see also* Letter from Heather Burnett Gold, President, ALTS, to William F. Caton, Acting Secretary, Federal Communications Commission (July 24, 1997), at Attachment (Letter from Larry Vanderveen, Great Lakes Regional Vice President, Brooks Fiber, to Ted Edwards, Vice President-Sales, Ameritech Information Industry Services (July 9, 1997)).

[978] 47 U.S.C. § 222. Section 222 establishes restrictions on the use of CPNI obtained by telecommunications carriers in providing telecommunications service to customers, as well as requirements related to the availability of subscriber list information. We note that, at the request of certain carriers, the Commission has commenced a rulemaking to clarify obligations under this section of the Act. *See Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, Notice of Proposed Rulemaking, 11 FCC Rcd 12513 (1996).

[979] Ameritech Application, Vol. 2.2, Earley Aff. at 19-20, and Vol. 2.7, LaSchiazza Aff. at 8-9, 13.

[980] *See* Department of Justice Evaluation at 28-29.

objectives of promoting competition and deregulation of telecommunication markets.[981] In order to expedite such entry, we believe it would be useful to identify certain issues and make certain inquiries for the benefit of future applicants and commenting parties, including the relevant state commission and the Department of Justice, relating to the meaning and scope of the public interest inquiry mandated by Congress. We emphasize, however, that we are not here examining the public interest showing made in Ameritech's application, nor is our discussion intended to be an exhaustive analysis of the scope of our public interest inquiry generally.

382. Commenters in this proceeding have proposed various standards for analyzing whether granting an application for in-region, interLATA authority is consistent with the public interest requirement. The Department of Justice, for example, states that grant of a section 271 application is not consistent with the public interest absent a demonstration that the local market is "irreversibly open to competition."[982] Sprint suggests that the public interest requirement is satisfied once a BOC shows that local competition has been "enabled,"[983] and CPI maintains that the Commission "should examine . . . whether consumers in the state have a realistic choice for local telephone service."[984] Ameritech asserts that the "proper 'public interest' standard for approval of [a section 271] Application is whether the

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[981] *See* Joint Explanatory Statement at 1 (stating that the intent of the 1996 Act is "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition. . . .").

[982] Department of Justice Evaluation at 3. The Department of Justice also enunciates this standard as "fully and irreversibly open to competition." *See* Department of Justice SBC Oklahoma Evaluation at 41 ("a BOC must establish that the local markets in the relevant state are fully and irreversibly open to the various types of competition contemplated by the 1996 Act . . ."); *see also* Department of Justice Evaluation at 29.

[983] Sprint Comments at 32.

[984] CPI Comments at 5. *See also* Michigan Attorney General Comments at 8 (the Commission must examine whether the presence of competitive carriers in the local market: (1) demonstrates that barriers to local entry have been lowered and genuine facilities-based competition has emerged; and (2) effectively restrains the incumbent from using its local monopoly to harm competition in the long-distance market); Brooks Comments at 4 (the public interest standard requires the Commission "to look beyond an applicant's apparent compliance with enumerated requirements, and assure itself that the BOC cannot use its continuing control of the local exchange bottleneck to strangle local competition in its cradle"); KMC Comments at 2-3 (the public interest test includes an assessment of competitive conditions in the local market to determine whether the BOC possesses bottleneck monopoly power that it could use to impede competition in the interLATA market); LCI Comments at 21 (to satisfy the public interest standard, Ameritech must demonstrate that the benefits of its entry into the long distance market outweigh any harm that it might cause to competition in the local market); Time Warner Comments at 23-30 (the Commission should examine whether the local market is irreversibly open to competition); Bell Atlantic Comments at 9 (Commission should examine whether the requested authorization is compatible with purposes of the Communications Act other than opening markets to competition, such as universal service, rate averaging and rate integration).